

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re:

Lee Kill,

Case No. 05-88199-R

Debtor.

Chapter 7

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Order Sustaining Trustee's Objection to Debtor's Exemption

The debtor's schedule C claims an exemption in 715 Rutgers Road, Rochester Hills, MI, under "Const Art 10, Sec 3; MCLA 600.6023(1)(h), 600.6027; 559.214, *Hoyt v. Winstanley*, 221 Mich. 515, 191 N.W. 213 (1922)." The trustee objects to this claim of exemption on the ground that before filing bankruptcy, the debtor transferred his interest in this property to his wife by a quit claim deed and therefore did not have any interest in the property when he filed his bankruptcy petition.

The Court concludes that the trustee's objection should be sustained. 11 U.S.C. § 522(b) clearly permits a debtor to exempt "property of the estate." It does not, however, permit the debtor to exempt property that was not property of the estate when the case was filed. Moreover, although the trustee has filed an adversary proceeding to avoid the debtor's transfer to his wife as a fraudulent transfer, nothing in the bankruptcy code permits a debtor to exempt property that the trustee recovers for the estate in such an action. In *Lasich v. Wickstrom (In re Wickstrom)*, 113 B.R. 339 (Bankr. W.D. Mich. 1990), Judge Gregg persuasively explained:

If at any point in time prior to filing, the potentially exempt property is *voluntarily* transferred to a third party, all interests of the debtor in that property terminate. The property cannot subsequently be claimed as

exempt under the Bankruptcy Code based upon some *former* interest held by the debtor. If the debtor disposes of an interest in property, 11 U.S.C. § 101(50), and the debtor has no remaining legal or equitable interest as of the bankruptcy filing date, the transferred property is not property of the estate. Because only the debtor “may exempt from property of the estate”, the transferred property may not be claimed as exempt. 11 U.S.C. § 522(b).

Id. at 346 (footnotes omitted).

Citing *Gross v. Russo (In re Russo)*, 1 B.R. 369, 386 (Bankr. E.D.N.Y. 1979), the debtor contends that if the trustee succeeds in avoiding the transfer, the property will again be owned as tenants by the entireties as it was previously, that his creditors were thus not harmed by the transfer, and that therefore the property is properly exemptible. The Court does not find *Russo* persuasive. Rather, for the reasons stated in *Wickstrom*, this “no harm, no foul” argument must be rejected. *Id.* at 346-48.

The major argument of the Defendants is that because creditors could not have executed upon the entireties property had the transfers not been made, creditors are not, and could not be, prejudiced by the transfers; *ergo* “no harm-no foul”. The Defendants’ argument is based upon hypothetical facts that do not exist. Conveyances of property have legal ramifications. This court therefore must analyze the law in accordance with what happened rather than what might have happened.

Id. at 346. After that exhaustive analysis, Judge Gregg concluded, “[A]s a matter of law, the trustee is not prohibited from seeking to recover, as a preferential transfer or a fraudulent conveyance, the transfers of exempt or exemptible entireties property by the Debtor[.]” *Id.* at 352. In the context of this case, that conclusion means that the debtor cannot exempt property that the debtor voluntarily transferred even if the property could have been exempted had the debtor not transferred the property.

Accordingly, the trustee’s objection to the debtor’s exemption in the transferred property is

sustained.

Not for Publication.

Entered: March 21, 2006

/s/ Steven Rhodes

Steven Rhodes

Chief Bankruptcy Judge